said that she could not make a positive identification because "I sell so many tags and see so many people I would hate to positively identify a person that I had only seen that one time" (I R. 101–102). Motions for judgments of acquittal at the close of all the evidence were denied (I R. 129; see I R. 105–110).

ARGUMENT

1. Petitioner Smith's conviction was plainly supported by the testimony of the agents that he was actively engaged in preparing the mash for conversion into distilled spirits and by the fact that his clothes were found on the scene. The evidence was also sufficient as to petitioner Crumley. The jury could properly have concluded that one who drives up a country road to within 30 yards of an illegal distillery at 2:40 a.m., who hurriedly attempts to flee when he observes an unfamiliar automobile, and whose car is then found to contain traces of sugar, wheat and the same type of fruit-jar labels as those on jars delivered to the distillery by truck earlier that evening, was guilty of aiding and abetting the illegal business of distilling without bond.[4] The additional testimony that petitioner Crumley resembled the man who purchased the license tag for this truck simply tended to confirm what was already a strong case.[5] There is no substance to petitioner's suggestion (Pet. 9–10), that Crumley was convicted on evidence of presence

[4] This was the charge contained in count 3 (I R. 2), which in itself supports the sentence.

[5] The fact that the identifying witness could not be positive in her identification merely presented a factual question for the jury to resolve. See *Roberts* v. *United States*, 284 F. 2d 209 (C.A.D.C.), certiorari denied, 368 U.S. 863.

alone. On the contrary, the court charged that presence alone was insufficient and was but one factor for the jury to consider along with all other circumstances in the case (I R. 137). Since both courts below found the evidence to be ample, there is no occasion for further review by this Court. See *Scales* v. *United States*, 367 U.S. 203, 230; *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589–590.

2. The trial court concluded its aider and abettor instructions with the statement (I R. 141):

> It is not necessary to prove that the aider and abetter was present when the crime was committed, or actively participated in the very crime itself. He may be considered as having aided and abetted the commission of the crime if what he did made and tended to cause its commission.

Considered together with the language immediately preceding—which petitioners concede "rather fully and correctly" stated the applicable law of aider and abettor (Pet. 14, 15–16)[6]—the concluding remarks

[6] The court charged, *inter alia*, that "all who knowingly and purposely and intentionally join in a crime or who aid or abet or counsel, command or induce or procure its commission are partners in the crime and are, in the eyes of the federal law, equally guilty * * *. I charge you that in order to aid and abet another it is necessary that a defendant in some way associate himself with the venture, as Judge Deaver used to say 'get into it.' And it is necessary that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed * * *. The action and participation of the defendant must be such as is calculated and intended by the defendant to render some material or substantial aid or assistance to the venture" (I R. 139, 140).

were neither improper nor confusing. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 618–619.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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